No. 77-310

In the

Supreme Court of the United States

OCTOBER TERM, 1977.

DONALD R. SMITH, Treasurer of Illinois, MICHAEL J. BAKALIS, Comptroller of Illinois, ROBERT M. WHITLER, Department of Revenue of Illinois, JOHN W. CASTLE, Director, Department of Local Government Affairs of Illinois,

Petitioners,

vs.

ROBERT H. SNOW, individually and on behalf of all other taxpayers similarly situated, MARVIN E. SCHATZMAN, individually and on behalf of all other taxpayers of Cook County, Illinois, EDWARD J. ROSEWELL, as Treasurer and Ex-Officio Collector of Cook County, Illinois, STANLEY T. KUSPER, JR., Clerk of Cook County, Illinois, THE COUNTY OF COOK, a body politic and corporate, ILLINOIS CENTRAL GULF RAILROAD CO., a Delaware Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois.

BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD CO. IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate and misleading. It seeks to create the impression that the Supreme Court of Illinois resolved a conflict between the power of the State of Illinois to tax certain properties formerly belonging to the Illinois Central Railroad (IC) and the power of the Interstate Commerce Commission (I.C.C.) in approving the reorganization of the IC and the Gulf, Mobile and Ohio Railroad (GM&O) into a new entity—the Illinois Central Gulf Railroad (Gulf). No such conflict was put in issue or necessarily decided. Rather, the decision below principally involved only the question of the proper method for the State to tax the former property of IC after that property had been sold to Gulf in the I.C.C.-approved merger. This case was brought as a taxpayers' class action, to compel certain state officials to assess and tax the Gulf properties acquired from IC in the same manner that all the other railroad property in the state was assessed and taxed, rather than pursuant to the 1851 IC Charter. That Charter provided for a 7% gross receipts tax, in lieu of all other forms of taxation on the Charter property. Respondent herein, Gulf, claimed that it was entitled to be taxed on the Charter properties in the same manner as IC had been taxed. It did not prevail in that contention and accepts the result. It is perfectly willing to be taxed on the same basis as all other railroads in Illinois.

REASONS FOR DENYING THE WRIT

I

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION OVER THIS CAUSE UNDER 28 U.S.C. §1257(3).

(A)

THERE IS NO QUESTION OF THE VALIDITY OF A STATE STATUTE ON THE GROUNDS OF ITS BEING REPUGNANT TO THE LAWS OF THE UNITED STATES.

Petitioner claims that this Court has jurisdiction to review the decision of the Supreme Court of Illinois under 28 U.S.C. §1257(3). Points A and B under its "REASONS FOR GRANTING THE WRIT" (Petition at 11-17) are an attempt to come within the second basis for jurisdiction under §1257(3)—"the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." The Petitioner's position is premised upon its erroneous construction of the 1851 Charter and subsequent Illinois statutes as prohibiting the transfer of the IC charter property to Gulf under any circumstances. However, this construction of the 1851 Charter and the subsequent laws was expressly rejected by the Illinois Supreme Court when it said:

> Although we are unable to conclude that these provisions authorize the sale of the railroad as an entity we are *likewise unable to infer from these and other charter terms that the IC was forbidden to make such a sale.* No language in the charter may be fairly interpreted to prohibit such sale and we decline the State's invitation to construe the acts of the legislature 34 years or more after the charter's acceptance by IC and the enactment by the General Assembly, to imply

such a term in the contract between IC and the State. (Petition at A. 11) (emphasis added).

The opinion went on to discuss the I.C.C.'s powers, not as applied to rendering any state law invalid, but solely as creating a binding determination of "public interest" superseding the public policy prevailing when *Thomas* v. *West Jersey R.R.*, 101 U.S. 71 (1880) was decided.

The petitioner can not create an issue concerning the validity or repugnancy of the three state statutes cited in the Petition unless this Court first construes such statutes to prohibit sale of the IC property to Gulf. But this Court has stated that it has no jurisdiction authoritatively to construe state legislation. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1970). Certainly it will not construe a state statute contrary to the express construction given by that state's supreme court.

The Illinois Supreme Court thus decided that state law did not prohibit the transfer of the IC property to Gulf. It also decided that the contractual right of IC to pay the charter tax in lieu of all other taxes was personal to IC and could not be transferred to Gulf. This decision rests upon adequate independent state grounds, precluding this court from exercising jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

(B)

PETITIONER DID NOT PROPERLY PUT INTO ISSUE ANY FEDERAL TITLE, RIGHT, PRIVILEGE OR IMMUNITY.

(1)

THERE IS NO TENTH AMENDMENT QUESTION.

The opinion of the Illinois Supreme Court makes no reference to the tenth amendment of the United States

Constitution. That is because Petitioner made no reference to the tenth amendment until its request for rehearing. This was untimely. *Bowe* v. *Scott*, 233 U.S. 658 (1914).

Under any circumstances, Petitioner's tenth amendment issue is specious. The Illinois Supreme Court's determination that all of Gulf's property should be taxed under state laws generally applicable to all railroads, rather than to have a portion of the property taxed specially, is a determination of the method of taxation, as a matter of state law. The power of taxation reserved to the states by the tenth amendment is in no way infringed upon or questioned by the decision.

(2)

PETITIONER NEVER PROPERLY PUT THE VALIDITY OF THE REORGANIZATION IN ISSUE.

Petitioner never filed any pleading requesting the trial court to invalidate the consolidation of GM&O and IC into Gulf. It now in effect requests this Court to undo a five-year-old reorganization to which Petitioner has never directly objected. As the Illinois Supreme Court noted, the State was notified of the Interstate Commerce Commission proceedings but declined to attend. (Petition A16). Petitioner cannot seek relief for the first time in this Court when it wholly failed to exhaust the administrative remedies available to it before the I.C.C. more than 7 years ago.

II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

Regardless of its holding that no state law had been invalidated, to the extent that the Illinois Supreme Court

could be deemed to have passed upon a "federal question" by its citation of the Interstate Commerce Act and cases such as *Schwabacher* v. *U.S.* 334 U.S. 182 (1948) and *Seaboard Airlines R.* v. *Daniel* 333 U.S. 118 (1948) its decision is in full accord with the decisions of this Court and the laws of this land. Thus no showing has been made under Rule 19(1)(a) of the Rules of this Court that the decision of the Illinois Supreme Court was "probably not in accord with applicable decisions of this Court."

Similarly Petitioner has not raised a question of substance not heretofore determined by this Court as called for in Rule 19(1)(a). The Petitioner does not dispute the I.C.C.'s preemptive powers under renumbered section 5(11) of the Interstate Commerce Act, (49 U.S.C. §5(12)), but rather seeks to raise the narrow question whether absent a specific mandate by the I.C.C. ordering the Charter to be overridden, no such overriding should be implied. (Petition at 11). This contention is contrary to the long established and unquestioned authority of the I.C.C. under section 5(12) of the Act. The very language of section 5(12) provides that a plan approved by the I.C.C. may be carried out,

> without invoking any approval under State authority; . . . relieved from the operation . . . of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary . . . to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . . [A]ny power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

There is no requirement in the statute that the I.C.C. enumerate the laws it intends to preempt, and case law is to the contrary. In *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), it was held that *absent language manifesting a contrary intention,* I.C.C. approval of a railway merger carried with it an exemption from restraint of any other law inhibiting implementation of the merger.

While an inhibiting federal law was in issue in that case, the same reasoning applies to inhibiting state laws. As the Illinois Supreme Court pointed out, the sale of IC was the very foundation of the Plan of Reorganization approved by the I.C.C., and any state law or charater term inhibiting such sale would necessarily be overridden by the I.C.C.'s approval of the Plan. (Petition at A.15).

Moreover, the I.C.C. has long held that it need not expressly declare what laws are being overridden, since it deems section 5(12) to be self-executing. *Chicago, St. P., M. & O. Ry. Lease,* 295 I.C.C. 696. The court in *Brotherhood of Locomotive Engineers, supra,* expressly concurred with the I.C.C. in that proposition (314 F.2d at 432). The federal law as cited by the Illinois Supreme Court is thus firmly and soundly established. There is no substantial unresolved question of federal law involved in this matter.

Put simply, Petitioner contends that the I.C.C. could not validly approve the IC-GM&O-Gulf reorganization without expressly stating that it was overriding conflicting Illinois law. Petitioner makes this contention despite the I.C.C.'s ruling that it does not make such determinations, despite Petitioner's failure to alert the I.C.C. that there was a potential conflict with any state law, and despite the determination of the Illinois Supreme Court that no

such conflict exists. Petitioner's contention is not only unsubstantial, it borders on the frivolous.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

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